United Parcel Service *and* Richard W. Roberge.
Case 1-CA-17308

May 18, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On April 3, 1981, Administrative Law Judge George F. McInerny issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and Respondent filed cross-exceptions and a supporting brief in opposition to the General Counsel's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions, cross-exceptions, and briefs, and has decided to affirm the rulings, findings, and conclusions[1] of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its order the recommended Order of the Administrative Law Judge, and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

[1] Member Jenkins does not rely on *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), for the principle that the General Counsel bears the burden of proving a *prima facie* case; that principle was established generations earlier.

DECISION

STATEMENT OF THE CASE

GEORGE F. MCINERNY, Administrative Law Judge: Based on a charge filed on March 25, 1980, by Richard W. Roberge, an individual, the Regional Director for Region 1 the National Labor Relations Board, herein referred to as the Board, issued a complaint on May 15, 1980, alleging that United Parcel Service, herein referred to as UPS or Respondent, had violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, 29 U.S.C. § 151, *et seq.*, herein referred to as the Act. Thereafter, Respondent filed an answer to the complaint denying the commission of any unfair labor practices.

Pursuant to notice contained in said complaint, a hearing was held before me in Biddeford, Maine, on November 24 and 25, 1980, at which all parties appeared and were given the opportunity to present testimony and documentary evidence, to examine and cross-examine witnesses, and to argue orally. After the close of the hearing Respondent and the General Counsel filed briefs, which have been carefully considered.

Based on the entire record in this case, including my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. JURISDICTION

United Parcel Service is a New York corporation which maintains a facility in South Portland, Cumberland County, Maine, where it is engaged in the handling, distribution, and delivery of parcels, packages, and related materials within and outside the State of Maine. The jurisdiction of the Board is admitted and is not in issue.

II. THE LABOR ORGANIZATION INVOLVED

The record shows that Respondent has a collective-bargaining agreement with Truck Drivers, Warehousemen & Helpers Union Local 340, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein referred to as the Union. The complaint alleges, the answer admits, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

In February 1980,[1] Richard W. Roberge had been employed for about 9 years as a route driver for UPS, delivering and picking up parcels and packages. During the times material herein Roberge was assigned in the downtown area of the city of Portland. Respondent's witnesses uniformly testified that Roberge was not outstanding, either in a positive or a negative sense, and aside from a written warning given him on October 24, 1979, he had no disciplinary problems with management.[2]

The incident in October 1979 arose out of a complaint by a customer that Roberge was erratic in his delivery times. As a result of this David Sherman, the division manager in charge of the entire South Portland operation,[3] requested the UPS loss-prevention department to investigate the matter, whereupon Carl Driggers of the loss-prevention department and Supervisor Dean Dow followed Roberge on his route on October 22, 1979. They observed him commit a number of infractions of company rules, and finally, when he was seen coming back to his truck from his lunch break 13 minutes late, they suspended him.

Respondent is particularly concerned about unauthorized extensions of breaks or lunch hours, referred to in the record as "hanging on." Part of this concern is due

[1] All dates herein are in 1980 unless otherwise noted.

[2] I have examined and rejected testimony by Donald M. Simpson, a former supervisor for UPS who was discharged early in March 1980 for reasons which he considered unjust. Simpson exhibited a poor memory, and his testimony about the motivations of other supervisors tended to be so general and vague as to be worthless. His demeanor, moreover, did not lead me to believe he was a candid witness.

[3] There are about 18 supervisory people and 200 rank-and-file employees at South Portland.

to the obvious fact that employees who extend their lunch hours and breaks are being paid for not working, but in addition it appeared from the testimony, particularly that of Sherman, that UPS is proud of its image and ever watchful that its employees maintain company-imposed standards of promptness, neatness, and courtesy. Thus, Respondent reacted strongly to Roberge's departure from UPS standards of conduct. Roberge, who admitted to the charges against him, was given a 5-day suspension and was issued a "final warning notice" in writing, setting out his offenses and noting that "any further incidents would result in further disciplinary action up to and including your discharge."

The collective-bargaining agreement between UPS and the Union contains standard grievance procedures but Roberge did not file a grievance on account of this suspension, and the matter ended.

The contract also provides[4] for a 10-minute break in the morning and another in the afternoon. Further, the contract states, "All employees shall be entitled to a twenty (20) minute break if they work more than ten (10) hours. "The evidence herein shows that the standard workday for package drivers out of the South Portland facility was 10 hours. The Company's practice was for drivers who were going to be out for a period over 10 hours to call a dispatcher at or before 5 p.m. The driver and dispatcher would discuss the driver's current and projected work situation and the dispatcher made the decision as to when the driver shall arrive back at the terminal. An effort is made to stagger these arrivals, so that the unloading crew at the terminal can efficiently unload and process the packages the driver has picked up during the day. While the evidence is not clear, I infer from the record that in practice the dispatcher's instructions are based on his estimate of when the driver should stop deliveries and start back to the terminal so as to arrive at the proper time. This, in turn, was at least in part the reason why the Company read the contractual provision for the 20-minute break after 10 hours to mean that the break would be paid for, but had to be taken after the driver arrived back at the terminal rather than at the expiration of the 10 hours if the driver was still on the road.

There is no evidence as to when this rule was instituted, or whether there was any discussion on its effect among employees at that time. There was, however, a grievance filed by an employee named Milford C. Dube on November 30, 1979, alleging that he had been informed of the company policy that he had to take his 20-minute break after returning to the terminal. Dube claimed that he was entitled to take the break upon completion of the 10 hour's work wherever he happened to be. Dube's grievance was filed with the Union's office on December 6, 1979. On December 7, 1979, the grievance was discussed by Earl Sherwood, one of the Union's business agents, and David Sherman. Sherman explained the company policy as outlined above, and told Sherwood that the break would be taken where and when the Company decided it would be taken.[5] This resolution was accepted by Sherwood since there is no record of an appeal, as provided in the contract, to the New England Area Parcel Grievance Committee.[6] Dube was not called as a witness so it cannot be said that he was either satisfied or dissatisfied with this resolution.

In January, Sherwood left office and was succeeded by Adelard LeCompte, who is also secretary-treasurer of the Union. LeCompte testified that he went through Sherwood's file and found a number of grievances which had been filed but bore no indication as to what had happened with regard to them. Among these grievances was Dube's grievance of November 30, 1979. LeCompte therefore met with Sherman on January 25. Sherman went over the conversation he had had with Sherwood and LeCompte agreed with the Company's resolution of the matter: "I agreed with him that if they instructed drivers to be in at the center at a certain time, that is when the drivers would be in the center."

On the next day, January 26, LeCompte had a meeting with the drivers from the South Portland terminal. At that time, according to LeCompte, "a few drivers" mentioned that they were having "problems" with the 20-minute break.[7] LeCompte instructed the employees who were at the meeting that they had to return to the terminal when they were instructed to do so. If they could take their break and be in the terminal on time there was no problem. If they could not, then they were to return and take their break at the terminal.

Late in January or early in February, Respondent realigned the routes in the Portland area. A new route supervisor, John E. Harrison, was assigned by his supervisor, Dick Deery, to do an "area trace" of Roberge's route.[8] The area trace is a plotting of the route to allow the route to be done most efficiently and with a minimum of effort and mileage. There is no indication that the selection of Roberge's route for the area trace was improperly motivated, or that Roberge was singled out for special treatment.

The area trace on Roberge's route was to last 3 days beginning on February 11.[9] On that morning Deery told Harrison that he would also be riding with Harrison and Roberge in order to verify Harrison's knowledge of Respondent's delivery methods.[10]

[4] New England Supplemental Agreement, art. 60.

[5] Sherwood did not testify but I found Sherman to be a credible witness.

[6] This group is convened to hear grievance appeals from various UPS terminals throughout New England. The committee is composed in each case of three union representatives from locals not involved in the dispute and three company representatives from locations not involved in the dispute. If the grievance cannot be settled by the committee, provisions are made for outside arbitration.

[7] There is no evidence that Richard Roberge attended this meeting. Neither he nor LeCompte was asked if he was present.

[8] Harrison had been assigned as a supervisor in South Portland on February 1. He had previously been a timestudy man in the Company's industrial engineering division in Vermont.

[9] The 3 days were considered necessary because of variations in the route which required that period of time to cover.

[10] I have based my findings on the events in the period February 11 to 13 on the credible testimony of Harrison and Deery. I have not credited Roberge's testimnny where it differs from that of the two supervisors. Roberge testified that he had been undergoing medical treatment for an ulcer for 5 years, and attributed his actions on February 13, at least in part, on this ailment. However, he was examined by a physician paid by UPS in May 1979. On the form which he filled out, Roberge answered "no" in the space provided for "ulcer of the stomach (peptic or duode-

Continued

Before they left on the route on February 11, Roberge commented to Deery that driving with three people in the cab was not safe. Deery replied that UPS had been doing that for some time and would probably continue to do so. Roberge then said that when he took his break he would call OSHA (Occupational Safety and Health Administration of the United States Department of Labor). Deery said, "Fine, go to work." The cab area of Respondent's delivery trucks has only one seat, for the driver, so that any passengers would be required to stand either in the cab or in the cargo section of the truck. There is no indication that there were any further problems that day, but Deery did write up a report on the morning's exchange with Roberge and submitted it to Sherman.[11] Deery did not go out on the route after February 11.

Nothing further of substance occurred until 7:30 p.m. on Tuesday, February 12. At that time Roberge had completed 10 hours work on that day. He pulled the truck over to the curb and told Harrison that he was electing to take his 20 minute break at that time. Harrison told Roberge to take the truck back to the terminal and he would find out the reason why the Company wanted drivers to take their break at the terminal. Harrison was new to South Portland and new to supervising, and had not himself been a route driver. He had heard some talk among supervisors about this kind of situation but was not clear on the reasons. Roberge agreed and they returned to the terminal. Harrison checked with another supervisor, whose name he could not remember, and was informed about the need to get the incoming packages to the terminal so that they could be unloaded and sorted. Harrison conveyed this information to Roberge. Roberge then said that he had to submit a grievance because it was not right. Harrison then said, "Fine, but please talk to Dick (Deery) first." That was the end of that conversation.

The next morning, February 13, Harrison asked Deery to talk to Roberge about the matter before Roberge and Harrison left the terminal. Roberge asked Deery if he could take his 20-minute break on the road. Deery replied that he positively could not, explaining the company procedures on incoming packages. Roberge replied that it was not right. Harrison and Roberge then left the terminal.

While they were out on the route the matter of the 20-minute break was discussed. At one point Harrison asked Roberge if he was going to "challenge me and take the break" and Roberge answered that he was. After this conversation, sometime in the afternoon, Harrision called Sherman at the terminal and informed him of the situation. Sherman told Harrision about the Dube grievance and its resolution and also about the grievance procedures available to Roberge. Further, Sherman told Harrison to advise Roberge of the consequences if he did challenge Harrision, that he could lose his job.

At the same time he talked to Sherman, Harrison had also talked to a dispatcher, who told him that the truck was due back at the terminal at 8 p.m. On his return to the truck Harrison explained to Roberge what Sherman had told him. They continued to discuss this until sometime after 7:30 p.m. when Roberge pulled the truck over and said he was going on his break. Harrison asked him not to do this but to continue delivering. Roberge responded that he was hungry and that he wanted to get something to eat. Harrison then said he would appreciate it if Roberge kept on delivering, and then added, "I am instructing you to keep on delivering." Roberge said, "no," and Harrison then asked him for his keys and suspended him. Harrison drove the truck back to the terminal, took Roberge's paperwork, and told him to leave the premises.

On February 19 a meeting was scheduled in Sherman's office to discuss the situation. Roberge attended, together with Dennis Sisti, a shop steward, and Adelaid LeCompte. They reviewed the situation. Roberge and LeCompte explained their side of the story.[12] Sherman disagreed and told them that Roberge was terminated as of that date. The reasons as given orally by Sherman and in a termination letter of February 19 (erroneously dated February 14) were Roberge's prior final warning of October 24, his failure to follow his supervisor's instructions, and his taking an unauthorized break.

Roberge then filed a grievance alleging that he was suspended after attempting to take the 20-minute break due him after 10 hours of work, which suspension was changed to a discharge on February 19. The matter proceeded through the contractual grievance procedure and was finally presented to the New England Area Parcel Grievance committee on March 5. Both the Company and the Union made presentations to the Committee. LeCompte made the presentation for the Union, and went, in detail, into the question of the contractual right to take the 20-minute break on the road. His theory was that unless the Company had ordered a driver in by a certain time, which time did not permit the taking of the break on the road, the driver was entitled to do so. LeCompte further maintained that Roberge had never been advised on February 13 to come in at any certain hour.[13] Roberge testified in his own behalf, for the first

nal)" but did indicate "yes" in the space designated "nervous stomach." In the space provided on the form for details, Roberge explained the "yes" answer to the "nervous stomach" question by saying "periodically—no problem." I also note that Roberge listed on the form that he had last seen a physician in February for treatment of a "knee and ankle injury." The attending physician on that occasion was Dr. Monkhouse, the same physician who performed the physical examination on Roberge in May. Roberge asserted at the hearing that he told Dr. Monkhouse about the ulcer at the May physical. The doctor did not testify, but it is my opinion, based on the content of the medical examination, that Roberge did not tell the doctor about the ulcer. Otherwise, logic and experience show, the doctor would have made some notation of the fact. Thus, I find that Roberge did not tell the truth at the hearing on this important point and I discredit his further testimony on substantive issues.

[11] I find nothing unusual in this as the evidence shows that company supervisors wrote up reports on any incident involving employees. There is no evidence that this report was discussed further among supervisors, or that it played any part in Roberge's discharge.

[12] Roberge testified that he had consulted with Shop Steward Sisti twice on February 13, and that Sisti assured him he was within his rights in taking the 20-minute break on the road. There is no evidence that Sisti verified these statements at the February 19 meeting, later at the arbitration hearing, or at this hearing. I do not credit Roberge's statements that Sisti endorsed his actions on February 13.

[13] LeCompte was mistaken in this as I have found that Harrison informed Roberge that they had to be back in the terminal by 8 p.m. following Harrison's telephone call to the dispatcher about 5 p.m. on February 13. I do not credit Roberge's denial that he was so informed.

time bringing up his problem with the ulcer. Sherman made the presentation for the Company.

Although it is clear from Roberge's grievance, from LeCompte's testimony, and from the written presentation which LeCompte made to the committee that the question of interpretation of the guidelines for the 20-minute break was a vital part of this grievance, the committee chose to ignore that aspect of the grievance and the presentation.

The committee's decision reads as follows:

> Based on the evidence presented the panel in executive session ruled that Richard Roberge despite previous warnings and a five day suspension and with an [sic] repeated verbal warning, refused to follow supervisory direction. Consequently the claim of the Union is denied.

IV. ANALYSIS AND CONCLUSIONS

As a threshold question to a decision of the issues in this case, Respondent has raised, as an affirmative defense, the decision of the New England Area Parcel Grievance Committee in Roberge's case. Respondent urges that the case of *United Parcel Service, Inc.*, 232 NLRB 1114 (1977), enfd. *sub nom. Adam Bloom* v. *N.L.R.B.*, 603 F.2d 1015 (D.C. Cir. 1979), is controlling in the instant matter. I do not agree.

The case cited is very similar, and the Board, in overruling the Administrative Law Judge, did find that the award by the UPS-Union Area Parcel Committee in that case had met the standards established in *Spielberg Manufacturing Company*, 112 NLRB 1080 (1955). The Board therefore deferred to the award and dismissed the complaint therein.

After deciding the *United Parcel Service* case relied upon by Respondent, the Board decided *Suburban Motor Freight, Inc.*, 247 NLRB 146 (1980), in which it determined that it would "no longer honor the results of an arbitration proceeding under *Spielberg* unless the unfair labor practice issue before the Board was both presented to and considered by the arbitrator" (emphasis supplied). The record here is clear that Roberge presented the issue which is now before me in his grievance of February 19. That issue, Roberge's insistence on what he considered his contractual right to take his 20-minute break on the road, was briefed by LeCompte and presented to the New England Area Parcel Grievance Committee. But the second half of the equation, the consideration, if any, by the committee of that issue, was not met. The committee's decision did not even mention the issue of the 20-minute break. It is impossible to tell whether the issue was even considered, but the absence of a ruling or even comment on the issue suggests strongly that it was not. For that reason, despite my underlying conviction that the Board should keep a respectful distance away from situations where labor and management have arrived at mutually satisfactory accommodations, I decline to defer to the decision of the New England Area Parcel Grievance Committee.

Turning to the merits of the case, the complaint alleges that Harrison told Roberge on February 12 not to file a grievance but to talk to him, Harrison, instead. The facts do not support this allegation. Harrison's testimony, which I credit, admitted that Roberge had told him he was going to file a grievance, but Harrison's reply was, "Fine, but please talk to Dick first." I view this as a request or a suggestion, and I do not find in it any interference with Roberge's rights to union representation and thus no violation of the law.

The question of the lawfulness of Respondent's suspension and subsequent discharge of Roberge depends on whether Roberge's insistence on taking his 20-minute break after completing 10 hours' work on February 13 constituted protected concerted activity under the Act.

The General Counsel has advanced two theories in support of his position that the activity was protected and concerted. The first of these is based initially on article 18, section 1, of the contract between UPS and the Union, which provides that "under no circumstances will an employee be required or assigned to engage in any activity involving dangerous conditions of work or danger to a person or property or in violation of a government regulation relating to safety of a person or equipment." With this contractual provision as a base, the General Counsel has asked that I take official notice of a United States Department of Transportation regulation which forbids the operation of a motor vehicle, or requiring or permitting a driver to operate a motor vehicle, when "the driver's ability or alertness is so impaired, or so likely to become impaired, through fatigue, illness, or any other cause, as to make it unsafe for him to begin or continue to operate the motor vehicle."[14]

To complete the theory, the General Counsel argues that the evidence shows that Roberge was suffering from an ulcer, exacerbated by the strain of having Harrison with him for 3 days, and that his assertion of his right to take his break implicitly asserted the contractual provision cited above, including by reference the Department of Transportation regulation. Since the assertion of a contractual right, even as an individual, has been held to be concerted, and thereby protected, Roberge's assertion of his right to take the break was protected concerted activity. *N.L.R.B.* v. *Interboro Contractors, Inc.*, 388 F.2d 495, 499-500 (2d. Cir. 1967).

The difficulty which I find in this novel and imaginative theory is that Roberge had never told anyone in management about his ulcer, and did not on the night of February 13 tell Harrison that the ulcerous condition was a reason why he did not wish, or did not feel able, to continue his route. Roberge admitted on cross-examination that he was aware of procedures used by drivers to report off sick, or even to return to the terminal during the workday if they were sick. Roberge admitted that he had used these procedures himself, but offered no explanation of why he did not tell Harrison of his condition, or even that he did not feel well, on February 13.

Further, I find no support for the General Counsel's theory in the case he has cited to support it. In *Varied Enterprises, Inc. d/b/a Private Carrier Personnel*, 240 NLRB 126 (1979), the Board held that the employer violated Section 8(a)(1) of the Act by discharging an em-

[14] Department of Transportation Regulations, subpt. A, sec. 392.3, issued under authority of 49 U.S.C. § 304 (1981).

ployee who had refused to drive a tractor-trailer which was of such a length as to be illegal in several States through which the driver's route would pass. In that case, however, it was more than apparent that the employee expressed very clearly to management the reasons why he was refusing to drive the truck as ordered. Here there is no evidence that Roberge mentioned pain, illness, safety, or anything else which would furnish a clue that his protest was based upon any factor other than the contractual provision for a 20-minute break at the end of 10 hours' work. Therefore, I do not find that Roberge's assertion that he was entitled to the break, and that he was hungry, is sufficient to establish the theory advanced by the General Counsel.

As I have noted, however, that Roberge was asserting a contractual right to take his break while on the road and that such an assertion ordinarily constitutes protected concerted activity. *Interboro Contractors, Inc.*, 157 NLRB 1295 (1966), enfd. 388 F.2d 495.[15] There are two factors which in my opinion serve to differentiate this case from *Interboro*. The first is that the contractually based complaints made by employees in *Interboro* were being raised for the first time. Here we have the Dube grievance of November 30 which, since it was not pursued beyond Sherman's denial of the grievance and assertion of the Company's right to determine when the break was to be taken, should have, and I find did, settle the matter.

The second distinction is that in *Interboro* the employer attempted to raise a defense that the employees involved there were discharged not for raising grievances under the contract then applicable, but for absenting themselves from their assigned work to an excessive degree. The Board rejected that defense, not because it was irrelevant, but because the defense appeared to be a *post hoc* justification for company actions, and followed a number of prior, inconsistent reasons given for the discharges.

Thus I find that Roberge, who was aware of the Dube grievance and its resolution, was not raising, on the night of February 13, a reasonably based contract claim. He was attempting to work only on his own terms and his conduct was neither concerted nor protected in these circumstances. *Yellow Freight System, Inc.*, 247 NLRB 177 (1980). In addition, it appears, and I find, that Respondent's assertion here that Roberge was discharged solely because of his past warning in October 1979, coupled with his insubordinate conduct on February 13, constitute legitimate business reasons for its action, and were consistently maintained over the course of the investigation and hearing of this case, in contrast to the shifting reasons found inadequate in *Interboro*.

Finally, the General Counsel's allegation that Roberge intened to complain about safety matters to OSHA has not been shown to have contributed in any way to his later discharge.

In the light of the findings I have made herein it appears to me that the General Counsel has not established a *prima facie* case within the meaning of *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980).

CONCLUSIONS OF LAW

1. Respondent United Parcel Service is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has not violated the Act in any manner.

Based on the above findings of fact, conclusions of law, and the entire record of this case, I issue the following recommended:

ORDER[16]

The complaint herein is dismissed in its entirety.

[15] Respondent thinks *Interboro* is an improper expansion of the coverage of the Act. In that regard the Court of Appeals for the Second Circuit seems to agree that a broad reading of *Interboro* is not warranted. *Ontario Knife Co.* v. *N.L.R.B.*, 637 F.2d 840 (2d Cir. 1980).

[16] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.